



STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

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TO: Members, Public Disclosure Commission

FROM: Doug Ellis
Director of Public Outreach

DATE: November 26, 2002

SUBJECT: Continuation of Rule-Making Process – Proposed WAC 390-17-110

The following draft rule is a continuation of the rule making activity undertaken at your August 27, 2002 meeting. You may recall that the proposed new rule addresses two types of notices to employees that are required under RCW 42.17.680:

- ❑ A nondiscrimination notice (RCW 42.17.680(2)), and,
- ❑ A revocation notice (RCW 42.17.680(3)).

At your December 2002 meeting, staff will be asking the Commission to approve language to be included in a proposed rulemaking notice, so formal rulemaking hearings may begin.

Proposed New Rule – WAC 390-17-110

New rule WAC 390-17-110 Notifying employees regarding voluntary payroll deductions. Chapter 156, Laws of 2002, requires annual notification of employees from whom wages or salary are withheld. Annual notification must include the non-discriminatory provision of RCW 42.17.680(2) and a notification about the right to revoke the authorization for payroll deductions at any time (RCW 42.17.680(3)).

The draft new rule would clarify who sends the notifications to employees, examples of what constitutes written notification, and retention of records. The statutory language, Legislative history and a recent State Supreme Court case were considered in drafting the new rule.

Nondiscrimination Notice – RCW 42.17.680(2)

RCW 42.17.680(2) requires that, at least annually, an employee from whom wages or salary are withheld be notified of the non-discriminatory provisions of the subsection. The subsection reads:

No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee. At least annually, an employee from whom wages or salary are withheld under subsection (3) of this section shall be notified of the provisions of this subsection.

The draft new rule at WAC 390-17-110 requires that the exact language of RCW 42.17.680(2) be part of an annual notification to employees who authorize payroll deductions for contributions under RCW 42.17.680. The statute directs that the employee “shall be notified” but does not specify who provides that notification. The statutory language under this subsection relates to “employer or labor organization” leaving open the possibility that the employer, the labor organization or both provide the annual notice of the non-discriminatory provision in the subsection.

A review of legislative floor debate on the notification issue provides some information but not clarification as to which entity, the employer or the labor union, should provide the non-discriminatory notification to employees. A summary of that information will be provided next. When a statute is ambiguous, courts will look to legislative intent to help determine the meaning of the statute. However, you may wish to keep in mind that while the legislative history about a statute can be helpful in certain circumstances, in Duke v. Boyd 133 Wn.2d 80, 942 P.2d 351 (1997), the State Supreme Court held that “one legislator’s comments from the floor are considered inadequate to establish legislative intent.” In addition, for this notification requirement, there are conflicting statements from Legislature.

Debate in the State Senate on February 16, 2002, the originating body of the employee notification amendments to Engrossed Senate Bill 6713, centered on who would give the notification. Two state senators explained that they anticipated the employer as the entity to provide notification to employees. See attached transcript of Senate Floor Action on ESB 6713.

In contrast, consideration of ESB 6713 in the State House of Representatives on March 8, 2002 was limited to a statement by State Representative Sandra Romero concerning notification of employees. Representative Romero said: “It (ESB 6713) also requires the unions and those that seek to take the donations to notify every person in the program every year.”

With no statement in the statutory language as to what entity is to provide notice, and with no clear direction from the Legislature, staff propose in the draft rule to fill in this gap by stating that both the employer and the labor organization are obligated under the law to ensure the annual non-discriminatory notification is sent to employees from whom wages or salary are withheld. However, two identical notices would not be required. Instead, it will be left to the employer, and the labor organization, to determine and agree as to which entity is in the better or more logical position to give the notice, dependent upon the circumstances of that employer and labor organization. If proper notification is not provided to employees by either entity, then both the employer and the labor organization would be subject to enforcement action.

Revocation Notice – RCW 42.17.680(3)

RCW 42.17.680(3) requires that, at least annually, an employee from whom wages or salary are withheld be notified of the right to revoke at any time the authorization for payroll deduction for contributions to political committees or for use as political contributions.

The draft new rule at WAC 390-17-110 requires that the employer ensure that revocation notification under RCW 42.17.680(3) is provided to employees. The statute reads in part:

The employee may revoke the request at any time. At least annually, the employee shall be notified about the right to revoke the request.

The statutory language of this subsection specifically identifies the “employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries” as the person responsible for the action required by this subsection. The new language of Chapter 156, Laws of 2002 did not amend the pertinent language by identifying a different responsible party.

In State ex rel. Evergreen Freedom Foundation v. Washington Education Association, 140 Wn.2d 615, 999 P.2d 602 (2000), the State Supreme Court provided some guidance. The Court held that the statute requiring annual written authorization from members for payroll deductions for political contributions does not apply to labor organizations. The Court stated, “The prohibition of subsection (3) is directed to an ‘employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries.’ The language of subsection (3) does include the words ‘labor organization,’ but does not characterize the organization as an “employer or other person or entity” paying the wages or salaries of employees.” The Court went on to state, “The interpretation of RCW 42.17.680(3) by the Public Disclosure Commission in WAC 390-17-100 clarifies any ambiguity and helps to implement the statute without amending it or frustrating its intent.” Justice Barbara Madsen, concurring with the majority opinion, stated, “I agree with the majority that RCW 42.17.680(3) does not apply to labor organizations.”

The legislature, in amending RCW 42.17.680(3) in 2002, removed the requirement for annual authorization and inserted a requirement of annual notification about the right to revoke the employee request, but it did not change the statutory language that was subject of the Supreme Court ruling in EFF v. WEA.

In light of this history, staff proposes in WAC 390-17-110 that the employer or other withholder of wages or salaries is the entity ultimately responsible for ensuring that the annual notification (about the right to revoke the request for contributions to political committees or for use as political contributions) is provided to employees.

The draft new rule states that employees from whom wages and salary are withheld under RCW 42.17.680 will be notified annually of the provisions in subsection (2) and that the employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries ensure that employees be notified of the right to revoke, at any time, the request to have contributions withheld. It should be noted that nothing in the new draft rule would preclude the employer from contracting with a labor organization to provide the annual notice to employees, if the labor organization is in agreement.

The draft new rule also provides for a contact name and address where revocation requests can be sent, outlines examples of what would constitute "written notification" and, provides guidance on the use of newsletters or similar publications and the retention of records.

Action by the Commission

At this point, staff is requesting the Commission approve language to be included in a proposed rule. If approved, staff will file the CR 102 Proposed Rule-Making notice with the Code Revisers Office and a public hearing will be scheduled.

Enclosures